Supreme Court, U.S.
FILED
NOV 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1593

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SHELL OIL COMPANY,

Appellant

vs.

DEPARTMENT OF REVENUE,
STATE OF FLORIDA

Appellee

Supplemental Brief for the Appellee

Sharon A. Zahner
Assistant General Counsel
Florida Department of Revenue
Carlton Building, Room 204
Tallahassee, Florida 32399-0100
(904)488-0712

COUNSEL OF RECORD FOR APPELLEE

Robert A. Butterworth
Attorney General
Joseph C. Mellichamp, III
Assistant Attorney General
The Capitol
Tallahassee, Florida 32399-1050
(904)487-2142

OF COUNSEL

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

"Iowa" 1

"Florida" 3

Obfuscation and Delay 7

Conclusion 12

Appendix

(a) Tropicana Products, Inc., v. Dept. of Revenue, Case No. CA-17-1799 (12th Judicial Cir., Manatee County, Florida, November 22, 1976) . . 1a

TABLE OF AUTHORITIES

Cases:

Hicks v. Miranda, 422 U.S. 332 (1975) 14

Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980) 13

Shell Oil Company v. Iowa Department of Revenue, No. 86-1565 (Oct. 21, 1987) 1

Tropicana Products, Inc. v. Dept. of Revenue, Case No. CA-17-1799 (12th Judicial Cir. Manatee County, Florida) aff. Per Curiam 353 So.2d 686 (Fla. 2nd DCA, 1977), Appendix 1a 7

Argument

Appellee, the Department of Revenue, State of Florida, submits this supplemental brief pursuant to Rule 16.6 of the Rules of this Court to oppose Shell's suggestion that this Court consolidate the case at bar ("Florida") with Shell Oil Company v. Iowa Department of Revenue, No. 86-1565 (Oct. 21, 1987) ("Iowa"). Such consolidation would be inappropriate and would permit Shell further opportunity to obfuscate the single legal issue present in "Florida".

"IOWA"

To identify the dissimilarities distinguishing the two cases, the following extracts from the decision of the Iowa Supreme Court are pertinent:

1. "The record (indicates) that assessment of additional corporate income taxes ... against Shell for the years 1975-1977, inclusive ...."[1]

---

[1]Shell Supp. Memo. App. 2a.

2. "During this period, Shell sold all of its OCS natural gas at the platform on OCS lands. In contrast, most of Shell's crude oil was transferred off OCS lands to other locations prior to being marketed."[2]

3. "Shell has indicated no particular area of Congressional policy in the management and control of the OCS lands which is frustrated by the state of Iowa applying a traditional measure of apportionment in order to obtain a valid local nexus for taxation purposes."[3]

4. "The inclusion of some OCS revenues in the apportionment formula is simply a method of obtaining an acceptable measure of the local nexus."[4]

5. "The inclusion of OCS revenues in gross sales for purposes of applying the statutory apportionment formula ... apparently aids in obtaining an accurate measure of the tax to be imposed ...."[5]

From the foregoing, the following conclusions may be fairly adduced:

---

[2]Shell Supp. Memo. App. 8a.

[3]Shell Supp. Memo. App. 9a.

[4]Shell Supp. Memo. App. 11a.

[5]Shell Supp. Memo. App. 13a.

1. The time-frame in "Iowa" is the tax years 1975-1977 inclusive;

2. Shell did establish that it had realized some indeterminate amount of revenues from sales of natural gas upon the OCS;

3. The Iowa Department of Revenue had included revenues from such sales in Shell's pre-apportionment tax base; and

4. The Iowa decision in major part addresses the propriety of the apportionment method applied.

"FLORIDA"

The essential disparaties with "Iowa" are clearly discernible in the following extracts from the record in "Florida".

The final judgment of the Circuit Court for Leon County states:

> 1. "This case involves Florida corporate income taxes for Shell ... for the years 1972 through 1975.[6]

---

[6]J.S. App. 3-1.

2. After deciding the motions for summary judgment, only one issue remained for determination, i.e., whether Shell's income derived from its production business on the Outer Continental Shelf ('OCS') should be apportioned by the apportionment formula contained in Section 214.71, Florida Statutes, as modified by Section 220.15, Florida Statutes (the 'Apportionment Formula') or by the Apportionment Formula as further modified by including OCS property, payroll, and sales in the denominators of the Apportionment Formula. Although this issue was originally part of Shell's motion for summary judgment, Shell withdrew this issue prior to the summary judgment hearing .... Shell has now filed a motion to amend to delete its prayer for relief relating to this withdrawn issue ...."[7]

Thus, Shell by its two amendments waived both the controverted factual issue of consumation of any sales upon the OCS and the issue of apportionment.[8] Next, the District Court

---

[7]J.S. App. 3-2.

[8]MDA 9 through 11.

of Appeals, in its decision, stated:

3. "... the income in Shell's case was realized totally from sales of oil in the various states of the United States.[9]

In its initial brief to the Florida Supreme Court, Shell stated:

4. "To avoid confusion on the important 'exclusion' (from income) issue, however, Shell elects not to argue the apportionment issue before the Court."[10]

Next, the decision of the Florida Supreme Court states:

5. "Accordingly, the dispute concerns only the income derived from sales of OCS oil actually made within the boundaries of the fifty states."[11]

The Solicitor General's brief contains the following two conclusions:

1. "Shell contends, however, that the States must 'back out' from Shell's apportionable tax base

---

[9]J.S. App. 2-16.

[10]MDA App. 11-3.

[11]J.S. App. 1-8.

that portion of its income deemed to derive from exploration and production activities occurring on the OCS, even though that income is not realized within the OCS through third-party sales."[12]

2. "Indeed, Shell in this Court specifically disclaims any challenge to Florida's apportionment formula. See note[3], supra."[13]

Confirmation of Shell's waivers as to its abandoned issues of fact and of apportionment is visible in the following extract from Shell's motion to compel filed post-decision with the Florida Supreme Court:

> "4. Shell can establish that the Department has in fact taxed actual sales on the OCS."[14]

Had Shell established the fact of any sales upon the OCS, this prospective offer of proof would be unnecessary and certainly is procedurally flawed. Had Shell established any sales upon the OCS,

---

[12]U.S. Br. 5.

[13]U.S. Br. 6.

[14]MDA App. 14-3.

the income realized therefrom would have been excluded by the Department in the manner established by the Florida courts which is applicable to all sales consumated by delivery beyond Florida's 3 mile jurisdiction limit.[15]

Shell, with its motion to compel, attached certain correspondence exchanged between the parties to this case. Particularly, the letter of the Department's General Counsel to Shell is expositive of Shell's abandonment of these two issues.[16]

OBFUSCATION AND DELAY

Consistent with its oral arguments before, and its post decisional filings with, the Florida Supreme Court, Shell

---

[15] Tropicana Products, Inc. v. Dept. of Revenue, Case no. CA-17-1799 (12th Judicial Cir., Manatee County, Florida) aff. Per Curiam 353 So.2d 686 (Fla. 2nd DCA, 1977), Appendix 1a.

[16] MDA App. 14-12 through 14-33.

has embarked upon a course of obfuscation of the single legal issue presented. First, the question presented to this Court by Shell is enlarged to include hypothetical elements (as to third party sales).[17] The certified question addressed by the Florida Supreme Court[18] and the question presented in the Solicitor General's brief[19] are consistent with the question presented by the Department and both exclude these hypothetical elements.

Further, Shell's jurisdictional statement references sales of natural gas upon the OCS made to third parties as well as sales of crude oil[19], which references are not evidenced in the Florida trial court record. Neither are

---

[17]MDA 16, 17.

[18]J.S. App.1-5.

[19]U.S. Br. (1)

[20]J.S. 8.

Shell's additional references to "all Shelf oil and gas production revenue from sales" and "the sales on the Shelf"[21]

Next Shell attempts to infuse the abandoned aportionment issue by stating "the Department ...included Shelf-derived oil and gas sales in the denominator of the apportionment formula."[22] Moreover, Shell states that Florida's attempt "... is the most egregious distortion of an apportionment formula ... by reason of exclusion of payroll and property factors ...."[23]

This pattern of repeated references to the two waived issues in the jurisdictional statement can and does operate to obfuscate the single issue of law encompassed in "Florida". Shell's

---

[21]J.S. 10, 11.

[22]J.S. 11.

[23]J.S. 22.

suggestion to this Court that it consolidate "Florida" with "Iowa" when the latter subsequently comes before this Court is an obvious ploy to accomplish thereby the infusion of the two waived issues. The suggested consolidation would accomplish indirectly what Shell is unable to accomplish directly, i.e., introduce factual substance to its phantom "production income". This would cloud the single issue presented in "Florida".

Moreover, "Florida" would be held in abeyance awaiting possible review by this Court of an Iowa court decision rendered almost eighteen months after the Florida Supreme Court's seminal decision. After the decision in "Florida", Shell filed a flawed petition for rehearing in which it argued the 2 issues abandoned in the trial court, thereby dishonoring its express waiver

contained in its initial brief to the Florida Supreme Court. Shell also filed a Motion for Order Compelling Compliance with Court Decision. That motion was premature when filed as the order was not yet final and in fact Shell appealed to this Court. Before this Court Shell petitioned for an extension of time in which to file its jurisdictional statement. The combined effect of these actions is to delay the resolution of "Florida" in the hope of thrusting "Iowa" into the single-issue Florida litigation. In sharp contrast, Shell offers to accelerate the filing of the jurisdictional statement in the multi-issued Iowa case in an obvious effort to further delay the resolution in "Florida". Shell's suggestion to consolidate "Florida" with "Iowa" frustrates orderly state tax

administration in the various states wherein the issue in "Florida" has arisen.

CONCLUSION

"Iowa" contributes nothing to aid resolution of "Florida", but rather an early decision in "Florida" would contribute to the subsequent resolution of "Iowa" and other litigation as well as administrative controversies pending between the oil industry and the various states.

Doubtless the combined effect of insubstantial OCS sales coupled with the absence of substantial investments made in the OCS via a property factor will focus attention on the fairness of Iowa's single sales factor apportionment method, which is a non-issue in "Florida". An early resolution of "Florida" would exorcise the ghost of two non-issues together with the spector of phantom

"production income". Shell should be held accountable for its elected litigation strategies in "Florida" in the manner this Court has applied in Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U.S. 425, 434 (1980).[24] Lastly, the Department agrees with the Solicitor General that the issue in "Florida" is of no great importance to the United States.[25]

The Department respectfully urges this Court to reject Shell's suggestion to consolidate but rather separately consider each of these two cases. Accordingly, the Department renews its motion to dismiss Shell's appeal in the case subjudice or to affirm the decision of the Supreme Court of Florida for want of a proper and substantial federal

---

[24]MDA App. 14-25

[25]U.S. Br. 6

question in the manner this Court explained in Hicks v. Miranda, 422 U.S. 332, 343 (1975).

Respectfully submitted,

Sharon A. Zahner
Assistant General Counsel
Florida Department of Revenue
Carlton Building, Room 204
Tallahassee, Florida 32301
(904)488-0712

COUNSEL OF RECORD FOR APPELLEE

ROBERT A. BUTTERWORTH, ATTORNEY GENERAL

Joseph C. Mellichamp, III
Assistant Attorney General
The Capitol
Tallahassee, Florida 32399-0150
(904)487-2142

OF COUNSEL

APPENDIX

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MANATEE COUNTY, CIVIL ACTION

TROPICANA PRODUCTS, INC., A Florida corporation,	)	
Plaintiff,	)	Case No. CA-74-1799
vs.	)	
DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,	)	
Defendant.	)	

FINAL JUDGMENT

This cause came on for hearing on the Motion for Summary Judgment filed by the Plaintiff, Tropicana Products, Inc. In support of its Motion for Summary Judgment, Plaintiff filed an affidavit of an officer of the corporation, setting forth the facts applicable to this case.

Having considered the pleadings on file, the exhibits thereto, and the Plaintiff's affidavit, it appears to the Court that the "sales" between Plaintiff and its wholly-owned subsidiary

corporations referred to in the aforementioned pleadings and affidavit should not be included in either the numerator or the denominator of Florida's apportionment statute (Florida Statutes, s. 214.71(3)) (except those between Plaintiff and Plantation Enterprises, Ltd., which Plaintiff concedes should be included). The purpose of Florida's statute is to apportion a part of a multistate taxpayer's total income from all sources to the State of Florida, in an amount roughly corresponding to the degree of the taxpayer's income-producing activities in Florida. Thus Florida has adopted a three part apportionment formula based upon the ratio between the taxpayer's Florida property and its total property everywhere, Florida payroll and its total payroll everywhere, and its Florida sales and its total sales everywhere. Under the facts of this case

the transactions between Plaintiff and its wholly-owned subsidiary corporations referred to in the affidavit do not reflect business activity of the type contemplated by the apportionment statute and thus inclusion of such "sales" would not be within the intent of the apportionment statute. Under the facts of this case the transactions are not "sales" within the meaning of Florida's apportionment statute, Section 214.71(3).

The second issue involves the method of computing Tropicana's income from foreign sales for the fiscal year ending August 31, 1972. Florida Statutes, s. 220.13(1)(b)(2) provides, in general, that in determining taxable income for Florida purposes sales outside the United States (less expenses attributable to such sales and deducted on the taxpayer's federal income tax return) are to be subtracted. In essence, net income

from foreign sales is to be excluded from a taxpayer's income for Florida purposes. The second issue in this case involves the property method of computing Plaintiff's net income from foreign sales.

The undisputed facts show that it is impossible to specifically allocate expenses to Plaintiff's foreign sales as opposed to its domestic sales. All, or virtually all, expenses incurred by Plaintiff and its subsidiary corporations are simply attributable to its overall manufacturing and selling activities and few, if any, expenses can be pointed to as being specifically incurred only in connection with foreign sales. Under these circumstances the parties agree that some type of mathematical allocation of expenses to foreign sales is called for. The problem is to determine the method of allocation.

It is the Court's opinion that under the facts of this case the correct method of determining Tropicana's net income from foreign sales is to multiply total gross foreign sales for the period in question by a fraction having a numerator equal to Tropicana's total actual net income for the period in question and a denominator equal to total sales (foreign and domestic). That is, under the facts of this case there is no reason to think that Plaintiff's net income from foreign sales is any different from its net income from all sales. Thus net income from foreign sales is an amount bearing the same ratio to the total foreign sales as total net income from all sources bears to total sales from all sources.

Net income before taxes of Tropicana and its subsidiaries for the period in question was $3,988,468.97. Total sales for this period were $31,552,133.26.

Thus the ratio of net income to total sales was 12.6%. Foreign sales were $1,685,145.00. This amount, multiplied by 12.6%, results in net income from foreign sales of $212,328.27, which amount should be subtracted from federal taxable income pursuant to Florida Statutes, s. 220.13(1)(b)(2) for the period in question.

It is thereupon ORDERED AND ADJUDGED THAT

1. The transactions between Tropicana Products, Inc. and its subsidiary corporations (with the exception of Plantation Enterprises, Inc.) should not be included in either the numerator or the denominator of the apportionment formula set forth in Florida Statutes, Section 214.71.

2. For the fiscal year ending August 31, 1972 sales in Florida of Plaintiff were $8,728,821. Total sales

everywhere for the same period were $100,048,377.

3. For the fiscal year ending August 31, 1973 sales in Florida of Plaintiff were $13,166,595. Total sales everywhere for the same period were $113,363,770.

4. Net income from foreign sales, to be subtracted in determining Tropicana's "adjusted federal income" under Florida Statutes, s. 220.13, for the fiscal year ending August 31, 1972, was $212,328.27.

5. Florida corporate income taxes properly payable by Plaintiff for its fiscal year ending August 31, 1972 are $228,571.45 and Florida corporate income taxes property payable by Plaintiff for its fiscal year ending August 31, 1973 are $421,466.45. The resulting deficiency in such taxes resulting from adjustments made by the Florida

Department of Revenue and not contested by Plaintiff, is $24,030.28 for the fiscal year ending August 31, 1972 and $30,873.01 for the fiscal year ending August 31, 1973.

Plaintiff's Motion for Summary Judgment is hereby granted in the foregoing respects and the Department of Revenue of the State of Florida is entitled to collect corporate income taxes against Plaintiff only in accordance with the foregoing.

DONE AND ORDERED in chambers at Bradenton, Manatee County, Florida, this 22nd day of November, 1976.

Gilbert A. Smith, Circuit Judge

Copies furnished to:

Brian C. Ellis
E. Wilson Crump, II